No. 06-71

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In the Supreme Court of the United States

DANTONE, INC. T/A CARRIAGE TRADE AUTO AUCTION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Nothing in the government's brief in opposition detracts from the compelling reasons why the Court should grant review in this case.

1. The government does not contest that since the statute's enactment over twenty-two years ago, this Court has not defined the intent with which a defendant must act to violate the bank fraud statute, nor does it contest that there is a multi-faceted split among the circuits concerning the intent required for a conviction. On the contrary, since opposing petitions for writs of certiorari in prior bank fraud cases,[1] the government has now updated its description of the conflict in two significant respects to reflect the even more complex current divide:

a. The government was constrained to remove the Third Circuit from the company of the Second, Fifth, and Seventh Circuits, where it previously had been said to fit.[2] Gov't Br. at 15. This is because in light of its ruling below, the Third Circuit is now an island of one. The government candidly acknowledges that "no other court of appeals has expressly adopted the Third Circuit's approach of applying the requirement of an intent to cause loss or liability to the bank only in situations where the bank was merely an unwitting instrumentality[.]" Gov't Br. at 18 n.8 (quotations omitted).

b. The government acknowledges the recent ruling of the Eighth Circuit in *United States v. Staples*, 435 F.3d 860, 867 (8th Cir. 2006). This case also stands alone, outside of the government's discussion of the

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[1] Brief for the United States in Opposition, *Wilson v. United States of America*, No. 03-304; Brief for the United States in Opposition, *Whitmore v. United States of America*, No. 02-126, reported at 2002 WL 32134864.

[2] *See* Brief for the United States in Opposition, *Wilson*, at 7.

longstanding split between the First, Sixth, Ninth, Tenth and Eleventh Circuits, on the one hand, and the Second, Fifth, and Seventh Circuits, on the other. Gov't Br. at 15. After surveying the split among circuits that hold the bank fraud statute "does not extend to situations where the defendant has no intent to expose the bank to an actual or potential loss," and circuits that have "rejected the requirement of an intent to harm or create a risk of loss to a financial institution," the Eighth Circuit staked out its own position: "For our part, we have treated the two subsections of the bank fraud statute differently," so that a conviction under 18 U.S.C. § 1344(1), but not a conviction under 18 U.S.C. § 1344(2), requires proof of loss, or attempt to cause a loss, to a financial institution. 435 F.3d at 866-867.

c. In short, with the continuing passage of time and the total absence of this Court's voice in defining the intent necessary for a bank fraud conviction, the conflicting approaches of the courts of appeal have further diverged. This deepening circuit split cries out for this Court's intervention and resolution.

2. The government also does not contest that settling the confusion among the lower courts on the basic intent element of the crime of bank fraud is a matter of great importance. The government does not (and could not) dispute that bank fraud is a crime prosecuted with great frequency. Yet the government continues to ask this Court to defer settling the law, outlining two reasons, both of which are less than persuasive:

a. The government leads with the argument that certiorari is not appropriate because the Third Circuit's ruling below was "correct." Gov't Br. at 15. Launching into an analysis befitting a merits brief, the government proffers a particular view of Congress's intent in passing the bank fraud statute – the very issue on which the lower courts are hopelessly divided. This

"correctness" argument, weak in any case as a reason to deny the writ, is all the more inapt here, where the purportedly "correct" decision below is, as the government concedes, an outlier among the circuits.

b. The government's second and final argument is that the writ should be denied because this case involves an affirmance of a conviction and arises in a case where the bank was a target of deception, whereas "virtually all of the cases in which courts have reversed convictions for lack of an instruction on, or proof of, a risk of loss to, or an intent to harm, the bank have involved situations where the bank was merely an 'unwitting instrumentality....'" Gov't Br. at 17. This argument suffers from a number of defects:

i. It is framed around an untenable premise. Surely it cannot be that the only cases that "count" are *reversed* convictions; affirmed convictions (like the one below), should they indeed be based on a standard of intent that fails to satisfy the statute, must count as at least as important in the administration of justice.

ii. The critical issue is that even on virtually *identical* fact patterns, the courts of appeal are hopelessly divided on the intent needed to sustain a bank fraud conviction. For example, in *United States v. McNeil*, 320 F.3d 1034 (9th Cir.), *cert. denied*, 540 U.S. 842 (2003), the Ninth Circuit took stock of the Seventh Circuit's ruling in *Davis*, which it agreed was a "factually similar case," 320 F.3d at 1037 (both involved improper cashing of checks from the IRS), but disagreed with the Seventh Circuit's conclusion that Section 1344(2) did not apply. The practical impact of this division among the circuits is so pronounced that even within circuits that read the bank fraud statute in the disjunctive, sometimes (but not always, exemplified by the case below) the government nonetheless seeks a conjunctive instruction, presumably for fear that if the law is ultimately settled in

favor of the conjunctive view, any resulting conviction will be in jeopardy. *See, e.g.*, *Staples*, 435 F.3d at 866 (by proposing "that the jury be instructed in the conjunctive," the government "assumed a burden to prove more than the statute required"). Against this backdrop, the government's continuing opposition to this Court's review is baffling.

iii. The government's argument fails on its own troubled premise. Even contorting the question so it is limited to cases where "courts have reversed convictions for lack of an instruction on . . . intent to harm[ ] the bank," the cases are *not* uniform. For example, as the government acknowledges, the Fifth Circuit approved the district court's reversal of a bank fraud conviction in a case outside the "unwitting instrumentality" context because the Fifth Circuit (like Judge Becker in dissent below) believed that the defendant had to be shown to have acted with "intent to victimize [the bank] by exposing it to actual or potential loss." *United States v. Schnitzer*, 145 F.3d 721, 734 (5th Cir. 1998) (internal quotation omitted).

iv. The government ignores petitioner's further argument that this case presents an optimal vehicle for settling the multi-faceted conflict because this case straddles both subsections of the bank fraud statute. Whether the statute is to be read in the disjunctive or the conjunctive is a threshold question itself embroiled in circuit conflict that is layered upon the intent conflict to cause the "troubling four-sided circuit split."[3] This case embraces both the intent issue and the disjunctive/conjunctive divide, with Judge Becker in dissent believing that the instructions "simply did not

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[3] M. Madia, *The Bank Fraud Act: A Risk of Loss Requirement?*, 72 U. Chi. L. Rev. 1445, 1449 (Fall 2005). Now that the Third Circuit has blazed its own path, it is more aptly described as a five-sided circuit split.

preclude the jury from convicting solely on the basis of subsection (2)," which he believed was unacceptable. App. 113a. The government does not contest petitioner's position that this additional feature of the case is present or that settling the intent question with reference to both subsections of the bank fraud statute is important.

v. Cases where the bank is an "unwitting instrumentality" in a fraudulent scheme are the *easiest* cases for requiring intent to harm the bank. Deferring for a case that presents the "unwitting instrumentality" fact pattern (assuming this Court ultimately agrees that at least in some cases, proof of intent to harm the bank is required) would leave the matter of intent unsettled for a large bulk of bank fraud cases where the bank is a target of deception. Contrary to the government's suggestion, it is clearly preferable for the Court to grant the writ in this case, presenting the harder fact pattern, so that if the Court were to agree with the dissenting view of the late Judge Becker and the views expressed by the Second, Fifth and Seventh Circuits that intent to defraud the bank is required for a conviction,[4] the question would be settled in a way that would encompass *both* categories of fact patterns.[5]

vi. Nor does the government dispute petitioner's position that this case is particularly suitable for review on a writ of certiorari because the bank fraud instructions drew objections at trial, so that this Court

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[4] *See United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998); *United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States v. Davis*, 989 F.2d 244, 246-247 (7th Cir. 1993).

[5] The government does not suggest that the fact pattern in the present case is extreme or unusual; on the contrary, it is a common fact pattern where the defense is mounted in significant part on the premise that another entity or individual, and not the bank, suffered the loss at hand and was the intended victim, if any, so that the bank fraud statute is not triggered. *See, e.g., Staples*, 435 F.3d at 867.

would review (as did the court of appeals) on a harmless error, not a plain error, standard.[6]

3. The government does not contest that there is a conflict among the courts of appeal on whether a jury instruction defining fraud by reference to lack of "moral uprightness" is acceptable. Nor does the government trivialize the concern that such instructions allow convictions premised on standardless "common law" crimes. *See United States v. Holzer*, 816 F.2d 304, 309 (7th Cir. 1987), *vacated on other grounds*, 484 U.S. 807 (1988). The government believes that certiorari is ill-advised nonetheless, expressing optimism that the importance of the issue is going to "diminish[ ]" because the Third Circuit expressed "concern" about the instruction. The government predicts that consequently, use of the problematic instruction "will likely wane." Gov't Br. at 21. But in affirming the conviction despite its concerns about "moral uprightness" in a jury instruction, the panel majority took pains to bolster its

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[6] The government's only response to this attractive feature of the case is to assert, in a footnote with no support, that in light of the "strength of the evidence, any instructional error was harmless." Gov't Br. at 19 n.10. Not so. The government's evidence of risk of loss to the bank, while it ultimately passed muster on review, was far from "strong." In a most unusual move, at oral argument, after full briefing and argument on the weight of the evidence, the panel required the government to submit further post-argument briefing reciting all its evidence that supported a finding of loss or risk of loss to the banks. In any event, this is an inapt distraction; as Judge Becker (who did not join in that part of the majority ruling to the extent it conflicted with his view of the elements of the crime, A. 109a) explained in dissent, "whether the evidence is sufficient to justify a conviction. . . is a very different question from whether the jury instructions communicated the proper legal standard." App. 116a. Simply because the quantum of evidence may have been *sufficient*, it does not follow that the evidence was so strong that correcting the erroneous jury instruction would not have mattered.

ruling by reference to other recent affirmances of convictions based on very similar jury instructions, including *United States v. Khorozian*, 333 F.3d 498, 503-09 (3d Cir.), *cert. denied*, 540 U.S. 968 (2003), and *United States v. Dobson*, 419 F.3d 231, 239 (3d Cir. 2005). The Third Circuit clearly has staked out the view that using the tool of reading jury instructions "as a whole," so long as jury instructions also contain additional, more firm formulations of fraud, it will find "no error" should the government seek, and obtain, an instruction defining fraud as a lack of "moral uprightness." App. 81a. This approach cannot insulate from review the recurring issue of the propriety of this troublesome jury instruction, repeatedly given in fraud cases.

4. Petitioner also seeks this Court's review of its contention that its Sixth Amendment jury trial and Fifth Amendment reasonable doubt rights were violated by the district court's order of forfeiture. Petitioner does not premise this aspect of its petition on a circuit conflict. There *is* no circuit conflict because this Court's ruling in *Libretti v. United States*, 516 U.S. 29 (1995), which (in the words of the Third Circuit sitting *en banc* on this issue below) "flatly holds that the Sixth Amendment is not implicated in the forfeiture context," App. 101a, leaves no room for a conflict to develop. Review is necessary because (again, in the words of the *en banc* court below) there is a "tension" between *Libretti*, which relied on the distinction between "sentencing factors" and "elements," and this Court's more recent Sixth Amendment jury right and Fifth Amendment burden of proof precedents,[7] which sharply undermine the

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[7] *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). That this Court, in *dictum* in *Booker*, mentioned 18 U.S.C. § 3554 as a statute unaffected by that decision increases

continued viability of such a distinction. The government argues that none of the post-*Blakely* court of appeals decisions have cast doubt on *Libretti*. This is simply not true. For example, the government cites *United States v. Fruchter*, 411 F.3d 377 (2d Cir.), *cert. denied*, 541 U.S. 965 (2004), but *Fruchter* only underscores the case for review. The Second Circuit explained that "*Libretti* remains the law until the Supreme Court expressly overturns it . . . . [W]e recognize that the conception of criminal punishment contained in [*Booker* and *Blakely*] is not necessarily the same conception of criminal punishment underlying the analysis in *Libretti*," but "the preponderance standard established in *Libretti* remains the rule." 411 F.3d at 381-382. Only this Court can square its own precedents. The premise of the argument is simple: the maximum punishment for bank fraud cannot be increased from imprisonment and a fine to imprisonment, fine *and forfeiture* unless two additional facts are proven beyond the elements of the offense: that certain "property" constituted or was derived from "proceeds obtained" by the defendant "as a result of" the offense, and that the defendant had an interest in that property. 18 U.S.C. § 981(a)(2). The sea change wrought by *Apprendi* and its progeny, potentially applicable to the critically important matter of criminal forfeiture orders imposed every day upon convicted defendants using a preponderance standard and without the benefit of a jury determination, is clearly in need of review; the issue has been litigated throughout the circuits,[8] in each instance with a foregone conclusion unless and until this Court addresses the issue.

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the urgency of this Court's giving careful attention to the issue; it does not counsel against it. *Compare* Gov't Br. at 24.

[8] See Petition at 23 n.36.

5. The government claims that petitioner's contention that the district court's order of restitution, based on contested findings of loss to the banks made by the district judge based on a preponderance of the evidence, "does not warrant further review." Gov't Br. at 26. The government does not, and could not, contend that the matter of the applicability of the Fifth and Sixth Amendments to orders of restitution is unimportant. Nor does the government contend that the circuits are not in conflict, at least as to the underlying question of whether restitution ordered upon conviction is criminal punishment. The government again argues, instead, that the Third Circuit below reached the "correct[ ]" conclusion: the "plurality opinion correctly viewed petitioners' jury convictions 'as authorizing restitution of a specific sum, namely the 'full amount of each victim's loss.'" Gov't Br. at 27 (quoting App.21a). The government champions the lead opinion of Judge Fuentes below, speaking only for a plurality of four judges, with the majority of the *en banc* court of appeals not joining in the plurality's reasoning, either concurring specially (three judges) or dissenting (five judges), in six separate opinions. The competing view of the five-judge dissent – the view that "restitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed," App. 37a – should be adopted by this Court. After all, as just stated with respect to forfeiture, the maximum punishment for the crime is increased from imprisonment and a fine to imprisonment, fine and restitution only upon proof of additional facts which are not necessary elements of the statutory crime: that the offense had a "victim" who (or which) suffered a "loss" in a certain amount. Whether there is any viable constitutional principle that permits restitution (found unanimously by the court below to be an aspect of criminal punishment) to be excepted from the rule that "[i]f a State makes an increase in a defendant's

punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt," *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi*, 530 U.S. at 476), is a critical question that should be reviewed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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